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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1950

No. 471

PHIL DAVIS,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI
to the United States Court of Appeals for the
Ninth Circuit
and
BRIEF IN SUPPORT THEREOF.

CLIFTON HILDEBRAND,
1212 Broadway, Oakland 12, California,
Attorney for Petitioner.

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PETITION FOR WRIT OF CERTIORARI
to the United States Court of Appeals for the Ninth Circuit.

To the Honorable Fred M. Vinson, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

Your petitioner Phil Davis, respectfully petitions this Honorable Court for a writ of certiorari directed to the United States Court of Appeals for the Ninth Circuit to review and reverse the judgment of said

Court entered on the records of said Court on the 11th day of December, 1950, affirming the judgment of conviction by the United States District Court for the Northern District of California, Northern Division.

JURISDICTION.

Jurisdiction of this Court is conferred by Title 28, Section 1254, Subsection 1 of the United States Code. United States Code Title 28, Section 1254, Subsection 1 reads as follows (46 U.S.C.A. § 526 1; Act of Apr. 25, 1940, c. 155 § 13, 54 Stat. 166):

> "Cases in the Court of Appeals may be reviewed by the Supreme Court by the following methods: (1) by Writ of Certiorari granted on the petition of any party to any civil or criminal case before or after rendition of Judgment of Decree."

JUDGMENT AND PROCEEDINGS BELOW.

Your petitioner was charged by an information filed in the United States District Court for the Northern District of California, Northern Division, on the 11th day of July, 1949, with a violation of Section 526 1, Title 46, U.S.C.A. of the reckless and negligent operation of a motor boat. Petitioner moved to dismiss the information on 2nd day of August, 1949, on the ground that the Court was without jurisdiction because the offense was not committed at a place under the jurisdiction of the United States Government.

The motion to dismiss was denied on the 2nd day of August, 1949 by the District Court.

The cause was then tried before a jury in the District Court and a judgment of guilty was entered on the 24th day of October, 1949.

Appeal was duly taken to the United States Court of Appeals for the Ninth Circuit, briefs were filed, oral argument was had and the judgment of the Court of Appeals affirming the judgment of the District Court was filed on the 11th day of December, 1950.

QUESTIONS PRESENTED.

1. Does the jurisdiction of the United States Government extend to the exercise of police power and the punishment for the reckless operation of a motor boat on the waters of Lake Tahoe?

2. Does the conduct of pleasure boating and fishing on the waters of a land-locked lake constitute that sort of commerce which the United States Government is empowered to regulate?

STATUTES INVOLVED.

The only statute involved is Section 526 1, Title 46, U.S.C.A. This statute is contained in the Motor Boat Act of 1940.

This statute provides that

> "No person shall operate any motor boat or any vessel in a reckless or negligent manner so as to

endanger the life, limb or property of any person."

CONSTITUTIONAL PROVISIONS INVOLVED.

We believe that the following two constitutional provisions are the only possible provisions applying to the facts of this case:

Article I, Sec. 8, Clause 3, of the United States Constitution provides:

> "The Congress shall have power * * * to regulate Commerce * * * among the several States * * *"

Article III, Sec. 2, Clause 1, of the United States Constitution provides:

> "The judicial Power shall extend * * * to all Cases of admiralty and maritime Jurisdiction; * * *"

REASONS WHY PETITION SHOULD BE GRANTED.

For the following reasons more fully set forth in the accompanying brief, petitioner believes this petition should be granted.

Petitioner was convicted of a violation of the above statute while operating a motor boat on the waters of Lake Tahoe, which is situated in the Sierra Nevada mountains at an elevation of 6,200 feet and lies partly in the state of California, and partly in the state of Nevada.

The evidence concerning the commercial use of this lake was very brief and is contained in the transcript

of record (pages 10 to 17). This evidence without denial establishes that for the past several years the waters of this lake have been used for only pleasure fishing, bathing, rental of pleasure boats, and sight-seeing cruises.

It is conceded that the state line is incidentally crossed during such sight-seeing cruises.

It is the contention of petitioner that under these circumstances the opinion of the Court of Appeals is squarely in confliction with the decisions of this Court contained in *Leovy v. U. S.*, 177 U.S. 622, 44 L. Ed. 914, and authorities therein cited and further the decision of this Court in the case of *United States v. Appalachian Electrical Power Co.*, 311 U.S. 377, 404 and authorities therein cited.

It is further the contention of petitioner that the opinion of the Court of Appeals is in conflict with the decision of the Court of Appeals of the Eighth Circuit in the case of *Harrison v. Fite,* 148 Fed. 781, and the decision of the Sixth Circuit Court of Appeals in the case of *Toledo Liberal Shooting Co. v. Erie Shooting Club,* 90 Fed. 680.

It is further the belief and contention of petitioner that the question here involved relating to the control of inland lakes used only for pleasure purposes is a question of importance and national interest which has not heretofore been decided by this Court.

Petitioner believes that the decision of the Court of Appeals in this case is in conflict with the decision of this Court in the *Leovy* case, supra, in that no sub-

stantial, profitable commerce is conducted on the waters of the lake within the meaning of the Constitutional provisions empowering Congress to regulate commerce. In the *Appalachian* case, supra, this Court held:

> "In truth the authority of the United States is the regulation of commerce on its waters * * * that authority is as broad as the needs of commerce."

Petitioner believes that under these decisions no possible claim of jurisdiction by the United States Government can be made. Certainly pleasure boating on a land-locked lake presents no broad need for Federal regulation of such activities.

In both of the decisions of the Eighth Circuit and the Sixth Circuit the Courts held that where the "commerce" involved consisted purely of pleasure activities that the Federal Government was without jurisdiction.

Even though it be conceded that the navigable character of the waters of Lake Tahoe has been established by usage in earlier years, petitioner believes that where such use has been entirely discontinued for a long period of time and where there is no reasonable prospect of any future use in a commercial sense, as an aid to the flow of commerce, that the continued exercise of police powers on such waters purporting to protect nonexisting commerce is an improper and unlawful attempt to seize jurisdiction. Clearly there is a wide distinction between the protection of such

waters from the erection of dams, drainage, or any other activity calculated to impair the usefulness of such waters for interstate commerce and on the other hand an attempt to control the operation of pleasure boats where no possible damage present or future could result from such operation.

Wherefore, your petitioner prays for a writ of certiorari directed to the Court of Appeals of the Ninth Circuit to review and reverse the judgment of the Court of Appeals.

Dated, Oakland, California,
December 27, 1950.

CLIFTON HILDEBRAND,
Attorney for Petitioner.

State of California,
County of Alameda.—ss.

Clifton Hildebrand, being first duly sworn, deposes and says: That he is the attorney for appellant in the above entitled action; that he has prepared and read the foregoing Petition for Writ of Certiorari and knows the contents thereof; that the facts alleged in said petition are to the best of his knowledge true and correct, and that your affiant makes this verification on behalf of petitioner.

CLIFTON HILDEBRAND.

Subscribed and sworn to before me this 27th day of December, 1950.

(Seal) AGNES B. THOMPSON,
Notary Public in and for the County of Alameda, State of California.

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1950.

No.

PHIL DAVIS,
Petitioner,
vs.
UNITED STATES OF AMERICA,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit.

JURISDICTION.

Jurisdiction of this Court is conferred by Title 28, Section 1254, Subsection 1 of the United States Code. United States Code Title 28, Section 1254, subsection 1, reads as follows:

"Cases in the Court of Appeals may be reviewed by the Supreme Court by the following methods: (1) by Writ of Certiorari granted on the peti-

tion of any party to any civil or criminal case before or after rendition of Judgment of Decree."

OPINION BELOW.

The opinion of the Court of Appeals for the Ninth Circuit affirming the judgment of the District Court for the Northern District of California, Northern Division, is contained in the transcript of record, page .....

ARGUMENT.

JURISDICTION IN THIS CASE CANNOT BE SUSTAINED UNDER ANY SECTION OF THE UNITED STATES CONSTITUTION.

In this case the Government must either justify its jurisdiction under the commerce clause of the Constitution, Article I, Section 8, Clause 3, or under Article III, Section 2, Clause 1, relating to admiralty and maritime jurisdiction. A thorough search of the authorities fails to disclose any decision of this Court enlarging the maritime jurisdiction to any waters totally unconnected with the sea. We believe that this Court should note that the statute under which petitioner was convicted is simply a part of the whole maritime regulations enacted by the Congress. We concede that during the growth of our nation the need for enlarged jurisdiction of waters by the Federal Government has constantly increased. We concede that the decisions of this Court have extended such jurisdiction very broadly to any waters calculated to be of use or benefit in the furtherance of commerce. We

recognize the logic of and necessity for uniform regulation of all maritime activities and the danger of inconsistent regulation as among the several states.

Whether Congress intended the statute in question as a maritime regulation or as a protection and aid to commerce, we believe that most certainly Congress did not attempt to regulate and did not have the power to regulate waters entirely land-locked and having absolutely no useful character as an aid to Commerce.

This Court stated in *Cooley v. Port Wardens,* 102 U.S. 691, 26 L. Ed. 238:

> "It is a matter of public history that the object of vesting in Congress the power to regulate commerce with foreign nations and among the states was to insure uniformity of regulation against conflicting and discriminating state legislation".

and in the case of *Leovy v. U. S.,* 177 U.S. 622, 44 L. Ed. 914 this Court stated:

> "When it is remembered that the source of the power of the general government to act at all in this matter arises out of its power to regulate commerce with foreign countries and among the states, it is obvious that what the Constitution and the acts of Congress have in view is the promotion and protection of commerce in its international and interstate aspect, and a practical construction must be put on these enactments as intended for such large and important purposes."

In this case the Government has relied strongly upon the fact that even though waters of Lake Tahoe are land locked and have no outlet to the sea

and lie high in the mountains, and further that the lake is in no practical way adapted for any sort of useful commerce between the State of Nevada and the State of California, that nevertheless, since the State Line bisects the lake, then the Federal Government must have jurisdiction. We call the Court's attention to the language of this Court in the case of *The Steamer Daniel Ball v. U. S.*, 10 Wall 557, 29 L. Ed. 999:

> "And we answer further, that we are unable to draw any clear and distinct line between the authority of Congress to regulate an agency employed in commerce between the States, when that agency extends through two or more States, and when it is confined in its action entirely within the limits of a single State. If its authority does not extend to an agency in such commerce when that agency is confined within the limits of a State, its entire authority over interstate commerce may be defeated."

Pleasure Boating and Non-Commercial Fishing on the Waters of a "Resort" Lake Do Not Constitute the Sort of Commerce Which Empowers the Federal Government to Police Such Waters.

We have discussed this question in the petition to which this brief is attached. We do not think that this Court has ever over-ruled the language used by it in the *Leovy* case, supra, when referring to the power of Congress to regulate certain waters:

> "But in order to give it the character of a navigable stream, it must be generally and commonly useful to some purposes of trade or agricultural commerce."

We certainly do not contend that regular transportation from one state to another would not constitute important commerce, but here there is no such showing. In this case the evidence demonstrates that the passage over the Nevada-California line is purely incidental to cruising the waters of the lake for pleasure purposes. This Court has held that in determining what constitutes commerce, all practical and reasonable factors must be taken into consideration. We believe that this Court is entitled to take judicial notice of the fact that this lake is completely surrounded by National Forests, that no considerable town or village exists along its shores, that the business conducted on both the Nevada and California shores relate entirely to resort purposes. That from the practical standpoint the State and Federal Highways which completely surround it now constitute one hundred per cent the channels of trade and commerce running to and from the settlements around the lake. Whatever may have been the uses of the lake prior to the building of such highways, they are now obsolete. In the light of these facts, it seems apparent that the Congress did not intend to expend money in continuing to regulate and police the waters of a lake which had once been navigable and useful to commerce merely upon far-fetched conjecture or speculation that sometime in the future useful commerce might again travel over such waters.

CONCLUSION.

Your petitioner and his counsel respectfully ask that the Court reverse the decision of the Court of Appeals upon the ground that the United States Government had no jurisdiction over the waters of Lake Tahoe and accordingly was without power to punish your petitioner for the act complained of.

Dated, Oakland, California,
December 27, 1950.

Respectfully submitted,
CLIFTON HILDEBRAND,
Attorney for Petitioner.

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BRIEF FOR THE UNITED STATES

In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 471

PHIL DAVIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. [illegible]) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on December 11, 1950 (R. 49). The petition for a writ of certiorari was filed on December 29, 1950. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1). See also Rules 37(b)(2) and 45(a), F. R. Crim. P.

QUESTION PRESENTED

Whether Lake Tahoe, which is transected by the California-Nevada state line, is a navigable water of the United States to which the regulations of the Motorboat Act of 1940, proscribing, *inter alia,* the reckless and negligent operation of a motorboat, are applicable.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, § 8, Clause 3 of the Constitution:

> The Congress shall have Power * * * To regulate Commerce * * * among the several States * * *.

Article III, § 2, Clause 1 of the Constitution:

> The judicial Power shall extend * * * to all Cases of admiralty and maritime Jurisdiction; * * *.

The Motorboat Act of 1940, c. 155, 54 Stat. 163, 166, provides:

> SEC. 13 [46 U. S. C. 526l]. No person shall operate any motorboat or any vessel in a reckless or negligent manner so as to endanger the life, limb, or property of any person.
>
> SEC. 14 [46 U. S. C. 526m]. Any person who shall operate any motorboat or any vessel in a reckless or negligent manner so as to endanger the life, limb, or property of any person shall be deemed guilty of a misdemeanor and on conviction thereof by any court of competent jurisdiction shall be punished by a fine not exceeding $2,000, or by imprison-

ment for a term of not exceeding one year, or by both such fine and imprisonment, at the discretion of the court.

STATEMENT

Petitioner was charged in an information filed in the District Court for the Northern District of California with recklessly and negligently operating a motorboat on the waters of Lake Tahoe, "a navigable body of water under the jurisdiction of the United States Government," thereby endangering the lives and limbs of two named persons, in violation of Sections 13 and 14 of the Motorboat Act of 1940 (R. 2). Petitioner's motion to dismiss the information on the ground that Lake Tahoe is not a navigable water of the United States (R. 3) was denied after a hearing (R. 17-23), and he was convicted following a jury trial (R. 4) and sentenced to six months' imprisonment and to pay a fine of $1,500 (R. 6).

At the trial, one Brenzel, a deputy sheriff of El Dorado County, California, and a long-time resident at Lake Tahoe, testified that until it sank in 1943 the ship "Tahoe" made regular trips three times a week across the lake from the California to the Nevada side, and carried passengers, mail, and commercial provisions (R. 11-13). During this time, several other boats had also carried mail and passengers for hire (R. 13). Brenzel testified that at the time of the trial there were on the lake some sight-seeing boats which made trips

from the California to the Nevada side, as well as some speedboats which could be rented, and some privately-owned pleasure boats (R. 13-14, 16), but that for at least six years prior to June 1949[1] there were no commercial or mail-carrying boats operating on the lake (R. 17). Brenzel stated that he had heard that the lake was about 1200 feet deep at its maximum depth (R. 14).

At the close of the trial, the court charged the jury, *inter alia,* as follows (R. 17):

> The Court takes judicial notice, and you are to take as an established fact that Lake Tahoe is a navigable body of water under the jurisdiction of the United States of America, and that El Dorado County is within the Northern Division of the Northern District of California, and, so, within the jurisdiction of this court.

In affirming petitioner's conviction (R. 36-49), the Court of Appeals took judicial notice of the facts that Lake Tahoe is about 21 miles long and from 8 to 12 miles wide and that it is transected lengthwise by the California-Nevada boundary (R. 41). On the basis of these facts and Brenzel's uncontradicted testimony, the court held that the lake is a navigable water of the United States (R. 40-46), and that the District Court was right in so instructing the jury (R. 46-48).

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[1] The date of the offense charged in the information was June 27, 1949 (R. 2).

ARGUMENT

1. The Motorboat Act of 1940 (*supra*, pp. 2-3) was amendatory of the Motorboat Act of 1910 (36 Stat. 462),[2] which this Court examined in *Kelly* v. *Washington*, 302 U. S. 1, 4-7, along with other statutes, to determine the extent to which Congress, in the exercise of its power under the commerce clause to regulate "with respect to vessels on the navigable waters of the United States" (p. 4), had occupied the field in requiring the inspection of the hulls and machinery of motor vessels. We think the court below was clearly right in holding that the 1940 statute "was passed as a commerce measure under the commerce clause of the Constitution" (R. 40). It is settled, of course, that the power of Congress to regulate commerce includes power over navigation, and that Congress may pass such legislation as it deems necessary to insure the safety and convenience of traffic on the navigable waters of the United States. *United States* v. *Appalachian Power Co.*, 311 U. S. 377, 404-405; *Economy Light Co.* v. *United States*, 256 U. S. 113, 121; *Leovy* v. *United States*, 177 U. S. 621, 632; *The Daniel Ball*, 10 Wall. 557, 564; *Gilman* v. *Philadelphia*, 3 Wall. 713, 724-725.[3]

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[2] The 1940 act is entitled, "An Act To amend laws for preventing collisions of vessels, to regulate equipment of certain motorboats on the navigable waters of the United States, and for other purposes" (54 Stat. 163).

[3] Sections 13 and 14 of the Motorboat Act constitute, as well, a substantive rule of admiralty and maritime law. "Al-

2. This Court has clearly defined what are navigable waters of the United States subject to regulation by Congress under the commerce clause. In the leading case, *The Daniel Ball,* 10 Wall. at 563, the rule is stated as follows:

> Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water. And they constitute navigable waters of the United States within the meaning of the acts of Congress, in contradistinction from the navigable waters of the States, when they form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce in conducted by water.

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though, in the absence of legislation by Congress, the courts merely by virtue of this grant of judicial power [Const., Art. III, § 2, cl. 1, *supra*, p. 2] have no jurisdiction of maritime crimes and offenses, * * * this clause does give Congress power to provide for the punishment of offenses committed upon any navigable waters other than those of the high seas, although within the jurisdiction of a state * * *." *Miller* v. *United States*, 88 F. 2d 102, 104 (C. A. 9). See also *Southern S. S. Co.* v. *Labor Board*, 316 U. S. 31, 41: "It has long been settled that the admiralty and maritime jurisdiction of the United States includes all navigable waters within the country. *The Genesee Chief*, 12 How. 443."

This rule has been followed[4] and extended in later decisions of this Court. In *United States* v. *Appalachian Power Co.*, 311 U. S. at 407-409, the Court held that if by reasonable improvements waters can be made available for traffic, they are navigable waters of the United States just as much as those which are capable of navigation in their natural condition. The "capability of use" rather than "the extent and manner of that use" for purposes of transportation and commerce is the true criterion of the navigability of waters. *The Montello*, 20 Wall. 430, 441. "When once found to be navigable, a waterway remains so" (*United States* v. *Appalachian Power Co.*, 311 U. S. at 408), and if it is "to be abandoned, it is for Congress, not the courts, so to declare." *Economy Light Co.* v. *United States*, 256 U. S. at 124. "Commercial disuse" (*Arizona* v. *California*, 283 U. S. 423, 453-454) and "lack of commercial traffic" on a waterway do not exclude it from classification as a navigable water of the United States. *United States* v. *Appalachian Power Co.*, 311 U. S. at 416; see also *Economy Light Co.* v. *United States*, 256 U. S. at 124. "Even absence of use over long periods of years, because of changed conditions, the coming of the railroad or improved highways does not affect the navigability of rivers in the constitutional sense." *United*

[4] *The Montello*, 20 Wall. 430, 439; *Economy Light Co.* v. *United States*, 256 U. S. at 121-122; *Oklahoma* v. *Texas*, 258 U. S. 574, 586; *United States* v. *Holt Bank*, 270 U. S. 49, 56.

States v. *Appalachian Power Co.*, 311 U. S. at 409-410.[5]

3. Applying the principles outlined above, we think it is clear, contrary to petitioner's sole contention here, that Lake Tahoe, transected as it is by the California-Nevada boundary, is a navigable water of the United States. At the time of petitioner's offense there was still some commerce on the lake carried on by sight-seeing boats which contacted points on both sides. Cf. *London Co.* v. *Industrial Commission*, 279 U. S. 109, 124: "Commerce is not prevented because the object of it is to serve the pleasure of passengers." Although in 1949 there were no strictly commercial or mail-carrying boats on the lake (R. 17), this "commercial disuse" did not operate to remove it from the category of navigable waters of the United States. As recently as 1943 there had been commercial and mail-carrying boats on the lake (R. 11-13). If "one hundred years [of disuse] is a brief space in the life of a nation" (*Economy Light Co.* v. *United States, supra*, 256 U.S. at 124), so also is the mere six years involved here. Thirty-five years ago Congress authorized the establishment and maintenance of aids to navigation on Lake Tahoe (Act of August 28, 1916, c. 414, §3, 39 Stat. 536, 538), and it has never seen fit to abandon the

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[5] Far from supporting petitioner's contention that Lake Tahoe cannot be considered a navigable water of the United States (see Pet. 5, 6), this case, upon which the court below relied (R. 42-43), directly and strongly supports its decision.

lake as a navigable water of the United States. Furthermore, the commercial potential of the lake in utilizing the timber, mineral, and agricultural resources of the area in which it lies must be taken into account. Cf. *United States* v. *Appalachian Power Co.*, 311 U.S. at 409.[6]

CONCLUSION

There is no conflict of decisions, and the court below correctly applied settled principles established by this Court. There is therefore no occasion for further review by this Court. The petition for a writ of certiorari should be denied.

Respectfully submitted.

PHILIP B. PERLMAN,
Solicitor General.
JAMES M. MCINERNEY,
Assistant Attorney General.
ROBERT S. ERDAHL,
ROBERT G. MAYSACK,
Attorneys.

FEBRUARY 1951.

[6] Petitioner's assertion (Pet. 5-6) of a conflict between the decision below and *Leovy* v. *United States*, 177 U. S. 621, *Harrison* v. *Fite*, 148 Fed. 781 (C. A. 8), and *Toledo Liberal Shooting Co.* v. *Erie Shooting Club*, 90 Fed. 680 (C. A. 6), is unwarranted. In the *Leovy* case, this Court observed that it could take no view of the evidence as to the extent of navigability of Red Pass that "warranted the jury in finding that interstate commerce was ever transacted thereon." 177 U. S. at 634. In *Harrison* v. *Fite*, the lake and part of the river involved contained dead trees, stumps, willows, and extensive aquatic growth so as to make commerce in a useful sense impossible. 148 Fed. at 785-6. In the *Toledo Liberal Shooting Co.* case, the bay in question was held to be "nothing more or less than a marsh opening into the lake." 90 Fed. at 682.

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